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No. 90-1897

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED ARTISTS COMMUNICATIONS, INC., PETITIONER

v.

THE MOVIE 1 & 2

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an allocation of movies among motion picture exhibitors, with the knowledge and participation of movie distributors, should be condemned as illegal per se under Section 1 of the Sherman Act or judged under the rule of reason as a non-price vertical restraint.

2. Whether a motion picture exhibitor can have monopoly power, for purposes of Section 2 of the Sherman Act, if there are no barriers to entry and the exhibitor exercises no control over the market's productive assets.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent The Movie 1 & 2 (The Movie) is a motion picture exhibitor. It opened its theater in Santa Cruz, California, in early 1984. The Movie intended to exhibit first-run "commercial" and "art" movies, but it did not succeed in obtaining licenses from motion picture distributors to show those films. In 1986, it sued its competitors, United Artists Communications, Inc. (UA) and Nickelodeon, Inc.

(Nickelodeon), and 19 motion picture distributors, for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. The Movie claimed that there was an agreement under which UA and Nickelodeon allocated licenses for nearly all first-run commercial movies in Santa Cruz to UA and for nearly all first-run art movies to Nickelodeon.[1] The Movie further claimed that the distributors were coerced or induced into cooperating with UA and Nickelodeon and refused to grant licenses to The Movie. Pet. App. A7-A8, C1, C5. One purpose of the alleged conspiracy was to eliminate The Movie as a competitor of UA and Nickelodeon.[2] The Movie also alleged that, by essentially the same agreement, UA had monopolized and attempted to monopolize the first-run commercial film market in Santa Cruz, Nickelodeon had monopolized and attempted to monopolize the first-run art film market, and the two had conspired to monopolize the first-run film market. *Id.* at C11.

2. The district court granted summary judgment for the defendants. It held that The Movie had failed to provide evidence of any agreement between any of the defendants, Pet. App. C11, and so had failed to raise a material issue of fact as to the critical conspiracy element of its Section 1 claim. With respect to its Section 2 claim, the court held that The Movie had failed to set forth facts sufficient to raise a material issue of fact as to the "willful acquisition or

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[1] Such an agreement is often called a "split," but, as petitioner makes clear, not all splits are alike. See Pet. 11 n.4. We think it more helpful to speak in terms of the actual conduct alleged and do not rely on the term here.

[2] The Movie abandoned its claim that "one purpose of the conspiracy was to eliminate [The Movie] as a 'price cutter.'" Resp. C.A. Br. 5 n.*. We assume this means only that The Movie did not press the contention that it was a price cutter.

maintenance" of monopoly power element of a monopolization claim or the "predatory or anticompetitive conduct" element of an attempted monopolization claim. Pet. App. C12.[3]

3. The court of appeals reversed unanimously.[4]

a. It ruled that The Movie had presented sufficient evidence to raise "a material issue of fact as to UA's participation in an agreement in restraint of trade," Pet. App. A16, and it therefore reversed the "summary adjudication of the section 1 claims in favor of UA," *id.* at A17.[5] The court observed that the claimed agreement in this case "is allegedly employed to restrict entry of other exhibitors into the Santa Cruz market for any film," *id.* at A19, and so characterized it as a boycott. Relying on *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985), the court concluded that per se analysis of the alleged agreement

[3] The district court did not specifically address the conspiracy to monopolize claim, but its holding of insufficient evidence of a Section 1 conspiracy presumably applies to the Section 2 conspiracy claim as well.

[4] Prior to decision, the court dismissed Nickelodeon and a number of distributors from the case following settlements among the parties. Pet. App. A7 n.1. Although the petition utilizes "et al." in the caption, UA appears to be the only petitioner.

[5] The court also held that, with respect to the distributor defendants, The Movie had "present[ed] sufficient evidence to present a triable issue on the section 1 claim of conspiracy to restrain trade in the form of a group boycott of [The Movie] through split agreements." Pet. App. A15-A16. This aspect of the case was the subject of another petition for a writ of certiorari, No. 90-1593, which the Court denied on June 24, 1991. *Paramount Pictures Corp.* v. *The Movie 1 & 2*, 111 S. Ct. 2852.

was appropriate and that, on remand, "the trial court should instruct the jury accordingly," Pet. App. A19.[6]

b. Turning to the Section 2 claims, the court of appeals held that there was sufficient evidence to create material issues of fact "as to whether UA willfully maintained monopoly power or engaged in anticompetitive conduct with the intent to destroy or discourage competition." Pet. App. A23. It also addressed other elements of the Section 2 claims, although the district court had not ruled on them. Relying on evidence that UA had 96.9% of the first-run commercial film exhibition revenues in Santa Cruz and Nickelodeon had 69.9% of the comparable revenues for art films, as well as on "other evidence in the record of the exhibitors' power to exclude competition from the Santa Cruz market," Pet. App. A21, the court concluded that The Movie had raised an issue of fact as to UA's possession of monopoly power. It recognized that market share "does not definitively establish monopoly power." *Ibid.* And it agreed with UA that no inference of monopoly power was proper if as a matter of fact barriers to entry into the market were sufficiently low and the distributors' control over the licensing of their own copyrighted films would constrain UA's exercise of monopoly power. *Id.* at A21-A22. But it said that, at this point, those arguments "do no more than clash with the evidence offered by [The Movie] that UA and Nickelodeon successfully

[6] The district court had stated that the alleged restraints were to be judged under the rule of reason. Pet. App. C5. Petitioner characterized that statement as mere dicta (because the district court had found no evidence of an agreement). *Id.* at A18 n.5. But since the court of appeals held there to be a triable issue of fact as to the existence of an agreement, it "address[ed] the applicability of the 'rule of reason' analysis," *ibid.*, because the issue would likely arise on remand.

excluded potential competitors from the Santa Cruz market." *Id.* at A22.[7]

DISCUSSION

The legal questions petitioner presents are not raised by the decision below. The court of appeals addressed the applicability of the per se rule only after reversing the district court's Section 1 holding on other grounds, and even then based its discussion largely on assumptions concerning what the evidence might establish. The court's Section 2 analysis did not reject petitioner's legal argument, but instead concluded that its applicability rested on undecided questions of fact. Accordingly, review by this Court is not warranted at this time.

1. UA's contention that the alleged conspiracy should be evaluated under the rule of reason rather than the per se rule is not ripe for review. The court of appeals' reversal of summary judgment did not turn on the choice between the per se rule and the rule of reason. Instead, it turned on whether there was sufficient evidence of conspiracy to defeat summary judgment.

Liability under Section 1 of the Sherman Act requires a "contract, combination * * *, or conspiracy"—*i.e.*, an agreement involving two or more actors. 15 U.S.C. 1. Whether the agreement at issue here is properly evaluated under the rule of reason or instead under the per se rule[8] was immaterial both to

[7] With respect to The Movie's allegations regarding a conspiracy to monopolize, the court in effect held that the evidence sufficing to avoid summary judgment on the Section 1 claim also sufficed to supply the concerted action requirement of conspiracy for Section 2 purposes.

[8] It is settled law that Section 1 prohibits only agreements that unreasonably restrain trade, that ordinarily this determination is made through application of the rule of reason, but

the district court's granting of summary judgment for defendants on the Section 1 claims and to the court of appeals' reversal of that judgment. The district court granted summary judgment because of insufficient evidence of agreement. Pet. App. C5. The court of appeals reversed the grant of summary judgment because it found "evidence * * * which raises a material issue of fact as to UA's participation in an agreement in restraint of trade." *Id.* at A16, A17. Nothing in either court's holding turns on whether the rule of reason or the per se rule should be applied. Thus, petitioner's first question is not properly presented by the decision below.[9]

Moreover, if the facts turn out to be as the court of appeals viewed the allegations—a joint conspiracy by exhibitors and distributors to exclude a competitor of the exhibitors[10]—then the court was correct in concluding that the jury, on remand, should be instructed

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that certain types of agreements, including certain categories of group boycotts, are so predictably harmful to competition that they are illegal per se. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 723-724 (1988); *Northwest Wholesale*, 472 U.S. at 290.

[9] The question is discussed in dicta in the opinions below, but this Court reviews judgments, not opinions, and certainly not dicta. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, Inc., 467 U.S. 837, 842 (1984); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

[10] We express no view on what factual showings may have been made below, or on the plausibility of The Movie's allegations. Likewise, there is no reason for this Court at this interlocutory stage of the proceedings to determine whether the court of appeals correctly assessed the raw factual record. The proceedings in the district court on remand will determine whether an agreement existed and the nature of any such agreement.

to apply the per se rule.[11] On that view of the facts, the alleged agreement would fall squarely within the category of concerted refusals to deal to which this Court has applied the per se approach: "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' " *Northwest Wholesale*, 472 U.S. at 294 (quoting L. Sullivan, *Law of Antitrust* 261-262 (1977)). Moreover, on this view of the alleged facts, "the boycott * * * cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, * * * and * * * the boycotting firms possessed a dominant position in the relevant market." 472 U.S. at 294. Accordingly, under this Court's precedents, per se analysis would be appropriate.[12]

Nor is there any conflict in the circuits about whether the per se rule would properly apply given the facts the court of appeals assumed here for procedural purposes. In *Balmoral Cinema, Inc.* v. *Allied Artists Pictures Corp.*, 885 F.2d 313 (6th Cir. 1989), the court affirmed rule of reason treatment of a particular split. But the plaintiff in that case did not allege that the challenged agreement was intended to

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[11] Contrary to petitioner's contention (Pet. 8), the court of appeals' opinion does not suggest that the per se rule should apply if the facts show the agreement here to be nothing more than a "vertical distribution mechanism for the licensing of motion pictures."

[12] We do not mean to suggest that all circumstances that might be labeled "group boycott" amount to per se Section 1 offenses. But if the facts here are as alleged, they would satisfy the "threshold showing" of "structural characteristics" justifying application of per se analysis. See *Northwest Wholesale*, 472 U.S. at 297.

drive it out of business, and the court characterized the *Balmoral* agreement among exhibitors as a "group buying program." *Id.* at 316.[13] The Ninth Circuit's description of the alleged agreement to which it would apply the per se rule is significantly different.[14]

2. Petitioner is not correct in asserting that the court of appeals wrongly rejected its "argument that market share was irrelevant because there were no barriers to entry and because the distributors indisputably control the market's 'productive assets.' " Pet. 15. Indeed, the court said that "[i]f borne out by the facts, this argument finds strong support in our recent decision in *United States v. Syufy Enters.*, [903 F.2d 659 (]1990)." Pet. App. A22. The court merely held that "summary judgment was not appropriate" "[i]n light of the conflicting evidence on this issue." *Ibid.* Thus, if petitioner has any claim of

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[13] We do note our disagreement with *Balmoral*'s open-ended suggestion that "[e]xhibitors, as purchasers of films, may be justified in combating the market power of film suppliers by group action." 885 F.2d at 316-317. But this question is not raised by the present case.

[14] There is also no conflict with *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978), in which the court explicitly "refrain[ed] from deciding whether the theatre split * * * was illegal per se," *id.* at 893.

In *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285, 293 (3d Cir. 1963), aff'd by equally divided Court, 378 U.S. 123 (1964), the court did indeed "decline to hold the split system to be per se illegal." But the decision is readily distinguishable because it noted that "each exhibitor was at all times afforded the opportunity to license the pictures of each distributor notwithstanding the split" and that "[t]here [was] no evidence that any exhibitor requesting participation in the split of product would have been excluded." *Ibid.* Indeed, petitioner notes that there is considerable variation among splits. Pet. 11 n.4.

error, it must be that the Ninth Circuit's holding in *Syufy* precludes a finding that the defendant exhibitors possess monopoly power.[15] But the court in *Syufy* held only that the district court after a full trial did not clearly err in finding no barriers to entry in Las Vegas. *United States* v. *Syufy Enters.*, 903 F.2d 659, 661, 664-665 (9th Cir. 1990). This case concerns Santa Cruz. And as *Syufy* also makes clear, the productive assets in movie exhibition include not only the films themselves, but also theaters and screens. *Id.* at 661-662. UA does not allege that the distributors control them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[15] Any claim of inconsistency with another Ninth Circuit decision is, in any event, a matter for that court, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Here, petitioner's suggestion of rehearing en banc was denied. Pet. App. B1.